STATE OF MICHIGAN

IN THE SUPREME COURT

SARON E. MARQUARDT, Personal Representative of the
ESTATE OF SANDRA MARQUARDT (Dec.)

Plaintiff-Appellant

V

Supreme Court No. 160772
Washtenaw County Circuit Court No. 12-621-NH
Court of Appeals No. 343248

VELLAIAH DURAI UMASHANKAR, M.D.

Defendant-Appellee

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PLAINTIFF/APPELLANT'S REPLY BRIEF

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FACTUAL SUMMARY

The following undisputed facts and law, excerpted from Appellant's brief, are being highlighted in support of Appellant's Reply Brief:

1. Drs. Umashankar, Haft, and Saran were all employees or agents of the University of Michigan Health System (UMHS); and they were all identified in the July 20, 2009 NOI as potential defendants. (Appellant's Exhibit 9)
2. The first NOI was ***mailed to*** the UMHS on July 20th and received by the UMHS on July 21st or July 22nd. (Appellant's Exhibit 10)
3. The first NOI clearly stated in the first paragraph: "***You are hereby notified that Sandra Marquardt intends to file suit against Jonathan Haft, M.D., Umashankar Velliah, M.D., Ranjiv Saran, M.D….upon the expiration of 182 days from the above date.***" (Appellant's Exhibit 9)
4. The first NOI clearly stated in the first paragraph: ***"This notice is being provided pursuant to MCL 600.2912b"*** (Appellant's Exhibit 9)
5. Dr. Umashankar left the United States at the end of September 2007, when his educational session ended at the UMHS. (Appellant's Exhibit 6)
6. The 182-day NOI period of time expired on January 18, 2010, which was a court holiday.
7. Plaintiff's Complaint was filed on January 19th. (Appellant's Exhibit 11)
8. Plaintiff passed away on January 27, 2010, which was within 30 days following the expiration of the statute of limitations on January 18th. That meant that her cause of action was saved pursuant to MCL 600.5856 for an extended period of time.
9. MCL 600.2912b(1) provides:

> "… a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person ***has given the health professional*** or health facility written notice under this section not less 182 days before the action is commenced." (Emphasis added.)

10. MCL 600.2912b(2) provides:

> "The notice of intent to file a claim required under subsection (1) shall be ***mailed to*** the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. ***Proof of mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered."*** (Emphasis added.)

11. MCL 600.2912b is part of the *Revised Judicature Act of 1961.*

12. MCR 1.103 provides: "The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan."

13. MCR 1.04 provides: "Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court."

14. MCR 1.05 provides: "These rules are to be ***construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error*** that does not affect the substantial rights of the parties." (Emphasis added)

15. MCR 2.105(J)(1) provides: "Provisions of service of process contained in these rules are ***intended to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances***. These rules are not intended to limit or expand the jurisdiction given the Michigan courts over a defendant." (Emphasis added)

16. MCR 2.105(J)(3) provides: "***An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service.***" (Emphasis added)

ARGUMENT

Appellee's first argument is that "…the NOI ***directed to and addressed to*** only the Risk Manager at the University of Michigan Health Center was not effective as to Dr. Umashankar and did not toll the statute of limitations as to Dr. Umashankar." (Emphasis added-Appellee's Brief page 10.) ***It is significant that neither MCL 600.2912b(1) nor subsection (2) uses the words "directed to and addressed to".***

Throughout Appellee's brief, this Court is reminded that the "unambiguous" terms found in MCL 600.2912b(1) and (2) must be followed. MCL 600.2912b(1) provides that the claimant must have: "…***given the health professional or health facility written notice***…." There is no reference to "directed to and addressed to" in that subsection. MCL 600.2912b(2) provides that the NOI "***shall be mailed to*** the last known professional business address or residential address of the health professional who is the subject of the claim." There also is no reference to "directed to and addressed to" in that subsection. Continuing with MCL 600.2912b(2): "***Proof of mailing*** constitutes prima facie evidence of compliance with this section." Still continuing: "If no last known professional business or residential address can reasonably be ascertained, notice may be ***mailed to the health facility where the care that is the basis of the claim was rendered.***" Again, there is no reference to "directed to and addressed to" contained within that subsection.

It is worth noting that Appellee did not just use those words one or two times in its brief. A careful review of Appellee's brief and various judicial opinions cited by Appellee reveal that the terms "directed to and addressed to", "directed to", "not directed to", "addressed to", and "not addressed to" were used more than 20 times. (Appellee's Brief, pages 1, 2, 6, 8-10, 12, 17, 18, 21, and 22.) A very careful reading of MCL 600.2912b(1) requires only that Dr. Umashankar be "given…written notice".

Appellee has never asserted that Dr. Umashankar did not receive a copy of the NOI mailed to UMHS on July 20, 2009. In fact, Appellee in its brief argues that "Actual Notice Does Not Excuse the Failure to Give the Notice Required by MCL 600.2912b". (Appellee's Brief, pages 21-26.)

MCL 600.2912b(2) actually only requires that the NOI "***be mailed to the last known professional address…of the health professional***…who is the subject of the claim." It is not disputed that professional address on the subject NOI was the "last known professional address" for Dr. Umashankar. (Emphasis added) Continuing, subsection (2) then states: "If no last known professional business…address can be reasonably ascertained, notice ***may be mailed to the health facility where the care that is the basis of the claim was rendered."*** (Emphasis added) Again, it is not disputed that the address on the NOI was the address for the health facility where the care was rendered.

Appellant fully complied with the unambiguous language contained in both subsections of MCL 600.2912b, albeit inadvertently. When the July 20, 2009 NOI was prepared and mailed, the undersigned had no way of knowing that Dr. Umashankar had left the country; and I certainly could not have found his address in Great Britain or India. Specifically, "written

notice" was given to Dr. Umashankar by mailing in to the UMHS facility, when the UMHS staff forwarded the NOI to him upon receipt.

Turning to Appellee's second position advanced in its brief. Appellee claims that there was nothing in the NOI that would have alerted Dr. Umashankar to the fact that a claim was being made against him. This claim is absurd at best. The NOI specifically states in the very first line: "You are hereby notified that Sandra Marquardt intends to file suit against…. Umashankar Velliah, M.D. [inadvertently the surname was reversed with the given name]…upon the expiration of 182 days from the above date." That notice went even further in the first paragraph: "This notice is being provided pursuant to MCL 600.2912b." Those two sentences in the NOI should certainly have alerted Dr. Umashankar of the fact that a claim was being asserted against him.

Finally, Appellee asserted that despite Dr. Umashankar's actual notice of the July 20, 2009 NOI, Appellant would not have been relieved of the obligation to comply fully with the requirements of MCL 600.2912b(1) and (2). Again, Appellant would argue that he fully complied with the unambiguous language of that statute by mailing the July 20, 2009 NOI to the UMHS's address. However, if for some reason it is determined that Appellant did not fully comply with the applicable statutory provisions, Appellant would argue that Appellee is not entitled to have the subsequent lawsuit dismissed, because Dr. Umashankar received actual notice of the July 20, 2009 NOI in a timely manner. Appellee, despite numerous briefing opportunities, has never asserted or provided any evidence to suggest that Dr. Umashankar did not receive actual notice regarding the subject NOI.

MCL 600.2912b is part of the *Revised Judicature Act of 1961;* therefore, the practice and procedure components of the statute are controlled by the *Michigan Court Rules of 1985,* which

means that the statutory provisions found subsections (1) (2) are subject to the applicable court rules. More specifically, MCR 1.103, 1.104, 1.105, and 2.105(J)(1)(3) are the relevant rules regarding the issues raised by Appellee in their challenges of the subject NOI. The Court of Appeals in *Hill v Frawley,* 155 Mich App 611 (1986) addressed that issue soon after the new rules were adopted, which included the MCR 2.105(J)(3). The Court stated:

> "Service of process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defenses." *Mullane v Central HanoverBank & Trust,* 339 U.S.306, 314 (1950); *Krueger v Williams,* 410 Mich 144, 156-158 (1981).

The Court went on to hold:

> "This constitutional precept has been included in a new section of the Michigan Court Rules, MCR 2.105(J)(3), which states: 'An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service."

The Court in *Hill* was faced with a factual scenario in which someone other than the defendant had signed for a certified letter that came to the defendant's office; however, defendant acknowledged getting the summons and complaint within the 180 day period of time and actually retained counsel to represent him. The Court reversed the trial court's grant of summary disposition; and held that MCR 2.105(J)(3) precluded dismissal of the action.

The Michigan Supreme Court in *Perin v Peuer,* 373 Mich 531 (1964) and in *Buscaino v Rhodes,* 385 Mich 474 (1971) held that court rules take precedence over statutes when it comes to practice and procedure. In the instant case, MCR 2.105(J)(3) controls, when dealing with issues regarding whether or not a defendant had actual notice.

The Court of Appeals had occasion to review the same issue regarding service of process in an administrative process between the Michigan Education Association and an individual

school district. The MEA conceded that it had failed to serve the school district with an unfair labor practices charge in accordance with a rule of the Michigan Employment Relations Commission; however, the school district's attorney was served with the charge and responded accordingly. The Court cited the *Hill* decision and held that MCR 2.105(J)(3) precluded the dismissal of the charge. *Michigan Education Association v North Dearborn Heights School District,* 169 Mich App 39 (1988).

The Court of Appeals in *West v Morris,* 151 Mich App 502 (1985) held that court rules take precedence over any conflicting statutory rules of practice pursuant to MCR 1.104. The Court went on to hold: "Furthermore, the rules are to be construed so as to secure the just, prompt, and inexpensive determination of every proceeding and avoid consequences of any error or defect in the proceedings which does not affect the substantial rights of the parties."

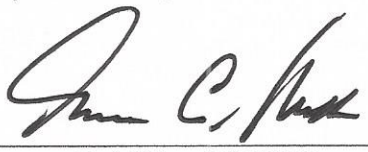
Appellee cited *Atkins v Suburban Mobility Authority for Regional Transportation,* 492 Mich 707 (2012) and *McCahan v Brennan,* 492 Mich 730 (2012) in an attempt to distinguish the provisions of MCR 1.103, 1.104, 1.105, and 2.105(J)(3). In both those cases the Supreme Court confronted efforts by plaintiffs who argued that a less than complete notice should be accepted as compliant with detailed statutory notice provisions. In the instant case, Plaintiff presented a fully compliant NOI; and the only question was whether or not it was received by Dr. Umashankar in a timely manner.

CONCLUSION

Appellant complied with the unambiguous requirements of MCL 600.2912b(1)(2). If this Court concludes that the July 20, 2009 NOI was not properly served pursuant to the statutory requirements set forth in MCL 600.2912b, then 2.105(J)(3) would still keep Dr. Umashankar from escaping liability because he was aware of the claim in a timely manner, when he received

a copy from the UMHS. Appellant would also remind this Court that MCL 600.2301 also provides a lifeline to preserve the long-standing claim by the Estate of Sandra Marquardt in order to serve the interests of justice. Appellant requests that this Court grant the application for leave to appeal; or at least grant oral arguments on the application.

Respectfully submitted,



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